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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re the Marriage of MARIA THERESA  
BAYLON-D'SOUZA and TREVOR  
NEAL D'SOUZA.

MARIA THERESA BAYLON-D'SOUZA,

Appellant,

v.

TREVOR NEAL D'SOUZA,

Respondent.

G042734

(Super. Ct. No. 06D005523)

O P I N I O N

Appeal from orders of the Superior Court of Orange County, Claudia  
Silbar, Judge. Affirmed.

Marc E. Mitzner for Appellant.

No appearance for Respondent.

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## THE COURT:<sup>\*</sup>

When Maria and Trevor D’Souza divorced they entered into a stipulated judgment for the custody and visitation of their minor daughter. The judgment provided that the parents would enjoy joint legal custody and the mother would have primary physical custody. Less than a year later, the mother filed an order to show cause in which she sought (a) to modify the visitation arrangement and (b) to appoint counsel for the minor, who was now ten years old, so the minor could express her preferences on visitation arrangements with her father. She said the father “has moved at least twice, exposed our daughter to a multitude of inappropriate behavior, interfered with our daughter’s extra-curricular activities, has exposed our daughter to domestic violence, and has created such a hostile environment in his home that our daughter does not want to have overnight visitation” with him. The father denied all this, stating that “the mother has already unnecessarily involved the minor in each and every aspect of the parties litigated divorce, mother has previously made several ex parte requests in furtherance of her stated objective to ‘make daddy crawl,’ [and] the parties’ child has a cell phone and opts to turn it off so as not to be bothered incessantly by mother’s numerous phone calls by her mother.” The family law court denied both of the mother’s requests and she appeals.

The mother makes two intertwined arguments. She complains the family law court violated its mandatory duty under Family Code section 3042 to consider the preferences of the minor in ruling on the request for modification of visitation. She then asserts the court abused its discretion in refusing to appoint separate counsel for the minor. We are not persuaded by either argument.

Family Code section 3042, subdivision (a) provides that, “If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody,

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<sup>\*</sup> Before Sills, P. J., Rylaarsdam, J., and Ikola, J.

the court shall consider and give due weight to the wishes of the child in making an order granting or modifying custody.” (See *In re Marriage of Rosson* (1986) 178 Cal.App.3d 1094, 1103, disapproved of on other grounds in *In re Marriage of Burgess* (1996) 13 Cal.4th 25, 38.) Under that section, and assuming it applies to requests to modify visitation as well as custody, the court must consider the child’s preferences only if it makes a finding that the child “‘is of sufficient age and capacity so as to form an intelligent preference.’” (See *In re Marriage of Slayton & Biggums-Slayton* (2001) 86 Cal.App.4th 653, 659.)

Whether a minor is of sufficient age and maturity to reason and form intelligent preferences is not based on the minor’s chronological age but on the individual facts of the case. (See, e.g., *In re Marriage of Mehlmauer* (1976) 60 Cal.App.3d 104, 110-111 [court not persuaded 14-year-old boy had any mature objective reasoning for his preference].) There was the mother’s declaration that her daughter was a “very mature and articulate ten year old,” but the court was not obligated to accept this unsubstantiated assertion. Instead, the court looked at the facts of the case—a bitter, on-going dispute over custody and visitation—and concluded: “I’m not leaving it up to a 10-year-old on a visitation issue. I’m not putting a 10-year-old in the middle of this.” Having read and considered the entire record, the court did not abuse its discretion in refusing to put this 10-year-old “in the middle” of the dispute.

The court also questioned whether the minor had any preferences of her own. It noted that the mother “did not state [] the child prefers something different than what is occurring.” The mother had complained the father “forced our daughter to share a room and sleeping accommodations with the minor children of his girlfriend. [He] has prevented our daughter from freely contacting me on the telephone while she is in [his] care and custody. [He] has also refused to cooperate with me concerning several vacations I desire to take with our daughter and has also frustrated my ability to keep our daughter enrolled and engaged in several extra curricular activities that she has been

involved in for several years now.” The mother said these were the minor’s preferences and the minor “is very frustrated and desires to have input and a decision with regard to her direct visitation with her father.” But the court saw it differently, noting these were “parenting, father/daughter issues, mother/daughter issues, not preferences.”

Even so, the court addressed each “preference.” It indicated that “[s]haring a room with another sibling, I don’t see a problem with that.” And “[o]n the phone contact, the child at this age should be able to call either parent while in the custody of the other parent when she makes the request.” As for the extra curricular activities, “it’s this court’s opinion if the child is engaged in extracurricular activities, it’s both parents’ responsibility to be sure the child is involved in that extracurricular activity on both parents’ time.” Finally, the mother wanted the child to be able to refuse to visit the father if she thought her father and his new girlfriend might argue. The court rejected that request. “I’m not going to order that the child not be around his girlfriend. There is absolutely no basis for it. They have had some arguments, something to that effect, but there is no basis that this woman is any threat to this child.” When everything is considered, it is clear the family law court did not violate any duty under Family Code section 3042.

The mother’s secondary argument, that the family law court abused its discretion in not appointing counsel, for the child also fails. It is premised on the assertion that this is an appropriate case in which the preferences of the child are relevant and must be considered before the court rules on the request to modify the terms of visitation. Family Code section 3150, subdivision (a) provides that “If the court determines that it would be in the best interest of the minor child, the court may appoint private counsel to represent the interests of the child in a custody or visitation proceeding.” California Rules of Court, rules 5.240 through 5.242 supplements the court’s authority and sets out specific factors the court should take into account in determining whether appointment of counsel is in the minor’s best interest. Whether to

appoint counsel for the minor is, however, discretionary and we see no abuse of discretion under these facts.

Finally, at the end of her opening brief the mother tosses in a make-weight procedural argument. She argues the court improperly allowed the father to file an untimely brief. (Code Civ. Proc., § 1005.) It is clear the father's paperwork was filed late and that the court considered it nonetheless. The mother, however, fails to show how the receipt and consideration of this late brief prejudiced her.

The orders are affirmed.